Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

BRUCE DILLARD,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does a person abandon Fourth Amendment standing to challenge the warrantless search of a locked briefcase by dropping it after being ordered by armed police officers "put your hands up," and by subsequently resisting arrest?

2. Does the constitutionally permissible scope of a search incident to arrest extend to a locked briefcase that is broken into and searched after the arrestee is handcuffed and removed from the area where the search occurs?

3. May a district court find that the contents of a locked briefcase would have been inevitably discovered during an inventory search when there is no evidence that the briefcase would have been inventoried?

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## OPINIONS BELOW

The decisions of the Court of Appeals affirming the district court's denial of Dillard's motion to suppress (Pet. App. 1a-29a) and order denying petition for rehearing *en banc* (*id.* at 30a-31a) are unreported. Partial transcripts of proceedings containing the district court's findings of fact and conclusions of law are included in the appendix. *Id.* at 32a-40a.

## JURISDICTION

The judgment of the Court of Appeals was issued on October 20, 2003, and a petition for rehearing *en banc* was denied on December 3, 2003. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. IV.

## STATEMENT

This case arises from the warrantless search of Petitioner Bruce Dillard's locked briefcase, which Dillard dropped after being ordered by police to "put your hands up" as he left a private residence. After Dillard was handcuffed and removed from the arrest scene, officers broke into his briefcase to search for evidence. Dillard was convicted of a drug crime based upon evidence found in the briefcase and sentenced to life in prison.

1. On May 26, 1999, police arrived at a two-story apartment house to execute a search warrant for the upper unit. Pet. App. 2a. Seven officers approached the side door of the apartment while three additional officers stationed

themselves around the house for security. *Id.* As the police approached, they observed Dillard and another individual leaving through the side door. *Id.* Dillard was carrying a locked briefcase. *Id.* at 2a. As Dillard and his companion reached the driveway, an officer announced, "Police, search warrant," or "Police, put your hands up." *Id.* Dillard immediately dropped his briefcase, which landed about four feet away. *Id.* As officers apprehended Dillard, he began to struggle and pulled a handgun from his waistband. *Id.* Within forty-five seconds to a minute, the police subdued Dillard, removed the handgun, and placed him in handcuffs. *Id.*

2. After Dillard was handcuffed and escorted from the arrest scene, officers recovered his locked briefcase. *See* Pet. App. 2a-3a, 26a, 42a. There was no testimony that officers had probable cause to believe that the briefcase contained contraband. An officer pried off the latches with a pair of pliers because "what I really wanted to determine was whether or not it needed to be photographed." *Id.* at 41a. Approximately 3.5 ounces of crack cocaine and related drug paraphernalia were found inside the briefcase, along with personal items such as toiletries. *See id.* at 2a, 14a, 28a.

3. On June 30, 1999, a federal grand jury indicted Dillard on three counts: (1) possession with the intent to distribute approximately 3.5 ounces of cocaine base (crack), in violation of 21 U.S.C. § 841; (2) using, carrying and brandishing a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and (3) possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Pet. App. 3a.

4. Dillard moved to suppress the evidence found in his briefcase. The district court held an evidentiary hearing on November 18, 1999. Pet. App. 3a, 32a-36a. The district court denied the motion. "[T]he reason the motion is denied is because there was a lawful search incident to arrest of that briefcase [sic]. And inevitably, what was in there would

have been found." *Id.* at 34a. The district court also found: "I think there is—certainly there is more evidence than not that he discarded that briefcase. But quite frankly, I'm not even going to decide the standing issue. I know that courts are supposed to decide that first, but I don't even—I think if I have to decide it, I think the government has the stronger argument that he discarded it." *Id.* at 35a.

5. Dillard filed a renewed motion to suppress on February 18, 2000, which the district court denied for the same reasons as the original motion. Pet. App. 3a. After Dillard's March 3, 2000 jury trial, the district court declared a mistrial because of the accidental inclusion of a search warrant affidavit in exhibits provided to the jury. *Id.* at 4a.

6. On May 30, 2000, the government brought a superseding indictment charging Dillard with the same three counts, plus two additional counts of distribution of cocaine base, in violation of 21 U.S.C. § 841. Pet. App. 3a. Dillard filed a renewed motion to suppress. The district court overruled the motion, stating, in part: "I do not believe the defendant has standing to object because the evidence showed that the defendant had abandoned that briefcase by throwing it away prior to his being apprehended. That's the evidence I found and I made those findings last November, and I believe they were correct." *Id.* at 3a-4a, 39a.

7. A second jury trial commenced on November 27, 2000, which also resulted in a mistrial when, after the first day of trial, the police found a razor blade in the briefcase that had not previously been discovered. Pet. App. 4a.

8. A third jury trial began on February 26, 2001. Pet. App. 4a. On March 1, 2001, the jury returned guilty verdicts on all five counts charged in the superseding indictment. *Id.* Dillard was sentenced to life without parole for the conviction under Count Three, and to a consecutive seven year term for the conviction under Count Four. *Id.*

9. Dillard timely appealed his convictions. Pet. App. 4a. In an unreported decision, the Court of Appeals for the Sixth

Circuit affirmed Dillard's convictions on all counts. *Id.* at 1a-29a. Judge Clay filed a dissenting opinion concerning the admission of evidence seized from the briefcase.

10. The majority determined that Dillard lacked Fourth Amendment standing to challenge the search of his briefcase because he abandoned it. The majority conceded that merely dropping an item when confronted by police does not constitute abandonment. "[T]here would be serious potential for abuse if police could compel an arrestee to 'abandon' property on his person, which would then be fair game for a warrantless search." Pet. App. 9a. But the majority concluded that because Dillard dropped his briefcase "so as to place himself in a better position to attack police officers," Dillard's privacy interest in the briefcase was not reasonable, and he forfeited standing to challenge the subsequent search. *See id.* at 9a-10a, n.1. The dissent reasoned that Dillard did not abandon his briefcase because he never disclaimed ownership, nor did he discard it while fleeing police. "He apparently dropped it in what appears to have been a reflexive reaction or an attempt at compliance with the officers' orders to raise his hands." *Id.* at 22a (Clay, J., dissenting). The dissent noted that even if Dillard dropped the briefcase to facilitate resisting arrest, such an act does not mean that he also intended to abandon the briefcase. *Id.* at 24a, n.3.

11. The majority alternately determined that even if Dillard did not abandon his briefcase, the search was lawfully conducted incident to his arrest, because the briefcase was within Dillard's exclusive control immediately prior to the arrest and the search occurred at the arrest scene. *See* Pet. App. 12a. The dissent reasoned that after Dillard was arrested, handcuffed and taken into custody, "all the officers (of which there were many at the scene) had to do was place the briefcase in a squad car or place it with the other evidence to be collected. There is no conceivable exigency that would reach a protective sweep of a locked briefcase." *Id.* at 27a (Clay, J., dissenting).

12. The majority also determined that the evidence found in the briefcase inevitably would have been discovered during a hypothetical inventory of Dillard's possessions that "in all likelihood" would have occurred after Dillard was taken to the police station. *See* Pet. App. 14a. The majority conceded, "[t]here is no evidence in the record on this point." *Id.* The dissent found that the lack of any evidence "tending to show that the briefcase's contents would inevitably have been catalogued pursuant to an established inventory procedure" precluded any finding that the evidence in the briefcase inevitably would discovered. *Id.* at 29a (Clay, J., dissenting).

13. Dillard timely filed a petition for rehearing *en banc* pertaining solely to the admission of evidence from the briefcase. Pet. App. 30a-31a. The court denied the petition on December 3, 2003. *Id.*

## REASONS FOR GRANTING REVIEW

Law enforcement officers have confronted persons carrying briefcases, shoulderbags, and similar items of luggage since the beginning of law enforcement. This simple and recurring scenario raises three significant Fourth Amendment questions for which the Court's precedent does not yield clear answers, and which have confused and divided the lower courts. The Court should grant *certiorari* to answer these questions.

First, when law enforcement officers encounter a person carrying a briefcase or similar item of luggage, and order that person, "Stop in the name of the law, and put your hands up!" it is clear that the person does not "abandon" Fourth Amendment standing to challenge a warrantless search of his briefcase by merely dropping it. But if the arrestee denies that the briefcase is his, or flees the authorities and discards his briefcase in a public area, that person has objectively manifested an intent to abandon any expectation of privacy in his briefcase. The question presented is whether a person abandons his briefcase by dropping it and ***not*** fleeing or

disclaiming ownership, but by resisting arrest. The Court's decisions in *Hester v. United States*, 265 U.S. 57 (1924) and *Smith v. Ohio*, 494 U.S. 541 (1990) (*per curiam*), establish guiding principles, but their application to these facts does not yield a clear answer. No other courts have expressly considered this issue.

Next, assuming the arrestee retains standing, the lower courts are divided about whether the fact of the arrest entitles the police to search the arrestee's briefcase incident to that arrest. The Court expressly declined to address this question in *Arkansas v. Sanders*, 442 U.S. 753 (1979), and has not addressed it since. Although the principles articulated in *Chimel v. California*, 395 U.S. 752 (1969), *United States v. Chadwick*, 433 U.S. 1 (1977) and *New York v. Belton*, 453 U.S. 454 (1981) are clear, the lower courts have struggled with their application. *Chimel* established that police may search the area of an arrestee's "immediate control" following an arrest in order to prevent the arrestee from obtaining a weapon or destroying evidence. *Chadwick* clarified that the area of an arrestee's immediate control did not extend to a locked footlocker reduced to the exclusive control of police. And in *Belton*, the Court defined *Chimel*'s area of immediate control to include the entire interior of an automobile, and any container found therein, upon arrest of the occupants. But none of these cases directly answers the recurring question of whether police may search an arrestee's luggage incident to the arrest when an automobile is not involved. The lower courts are divided about whether *Belton* modified *Chimel*'s area of "immediate control" to permit such searches. The Court has recognized the uncertainty arising from *Belton* by granting *certiorari* in *United States v. Thornton*, 325 F.3d 189 (4th Cir.), *cert. granted*, ___ U.S. ___, 124 S. Ct. 463 (2003). The question in *Thornton* is whether a *Belton* search of an automobile is permitted when the arrestee was not an occupant of the vehicle. The Court should grant *certiorari* in the present case to address whether *Belton* or its underlying rationale

applies at all when the property searched is not found in an automobile. Alternatively, a hold or summary disposition order for the Sixth Circuit to reconsider its decision in light of *Thornton* would be appropriate.

The final question is whether evidence obtained during a search that is not justified by any other exception to the warrant requirement is nevertheless admissible under the "inevitable discovery" doctrine recognized in *Nix v. Williams*, 467 U.S. 431 (1984). There is no clear consensus among the lower courts. Most that have addressed the issue have concluded that if illegally obtained evidence would have been discovered during a subsequent inventory of the arrestee's possessions, the evidence is not barred by the exclusionary rule, even though it was obtained illegally. The Court of Appeals for the District of Columbia has declined to extend *Nix* in this manner, recognizing that the practical consequences would promote warrantless searches, and moot this Court's precedent concerning exceptions to the warrant requirement. If the courts that have extended *Nix* to inventory searches were correct, all warrantless searches would be excused by simply pointing to an inventory policy that the police could have followed, but chose not to. The consequences of such a rule are obvious, and the importance of this issue cannot be overstated. The Court should immediately clarify that the inevitable discovery doctrine does not extend to hypothetical inventory searches.

The questions presented require an application of constitutional principles to a recurring fact pattern, and are not simply abstract questions involving pure factual determinations. The answers to these questions are of tremendous practical significance to the lower courts, law enforcement and criminal defendants. The Court should grant *certiorari* and answer these questions.

## I. THE COURT SHOULD GRANT CERTIORARI TO ANSWER UNRESOLVED QUESTIONS CONCERNING THE ABANDONMENT EXCEPTION TO THE FOURTH AMENDMENT

The Court has endeavored to resolve many questions concerning the people, places and things subject to Fourth Amendment protection against warrantless searches. Many of these cases have focused on the concept of standing, which depends "upon whether the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citing *Katz v. United States,* 389 U.S. 347, 353 (1967)). Far fewer cases have addressed when standing to invoke the Fourth Amendment is lost by "abandoning" property. The Court has yet to confront the issue of whether a suspect is deemed to have abandoned property for Fourth Amendment purposes by dropping it in the course of a spontaneous encounter with police and subsequently resisting arrest.

### A. The Court Has Articulated Principles Underlying The Abandonment Exception, But These Principles Do Not Answer Directly The Question Presented.

The Court has recognized three principles relevant to answering the question presented. First, physical relinquishment of property must be a voluntary act. In *Hester v. United States,* 265 U.S. 57 (1924), the defendant, upon noticing revenue officers approaching, fled through an open field, discarding a moonshine bottle along the way. *Id.* at 57. The Court found that the defendant had abandoned the bottle by voluntarily discarding it in an open field during flight. *Id.* at 58. "It would have been quite different, of course, if the revenue agent had shouted, 'Stop and give us those bottles, in the name of the law!' and the defendant and his accomplice had complied." *Brower v. County of Inyo*,

489 U.S. 593, 597 (1989) (discussing *Hester* in context of when "seizure" occurred for Fourth Amendment purposes).

The second principal is that a person who attempts to prevent a search or seizure of property has not abandoned that property. In *Smith v. Ohio*, 494 U.S. 541 (1990) (*per curiam*), the defendant threw a bag onto the hood of his car after being ordered by officers to "come here a minute." *Id.* at 542 (quotation omitted). The officer asked the defendant what was in the bag, to which the defendant did not answer. *Id.* As the officer reached for the bag, the defendant placed his hand over it. *See id.* The officer moved the defendant's hand and looked in the bag, discovering marijuana. *See id.* The Ohio Supreme Court had concluded:

> We do not adhere to the view taken by the lower courts to the effect that appellant had "abandoned" the bag when he threw it on the car and thus no longer retained any reasonable expectation of privacy with regard to it. Appellant was, at most, only two steps away from the bag at any time, and the evidence presented at the suppression hearing is clear that appellant physically attempted to prevent Officer Thomas from seizing the bag. Thus, in our view, appellant had not "voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search."

*State v. Smith*, 45 Ohio St. 3d 255, 263, n.6, 544 N.E.2d 239, 246 (1989) (citation, emphasis and internal quotation omitted). This Court agreed, stating: "[A] citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer's inquiry, clearly has not abandoned that property." *Smith,* 494 U.S. at 543-44 (citing *Rios v. United States*, 364 U.S. 253, 262, n.6 (1960)). The Court reversed the Ohio Supreme Court's determination that the search was lawful incident to the defendant's arrest. *Id.* at 543.

*Hester* and *Smith* also establish a third principal: physical relinquishment alone does not constitute abandonment. *See Hester,* 265 U.S. at 58; *see also Rios,* 364 U.S. at 262, n.6 ("A passenger who lets a package drop to the floor of a taxicab in which he is riding can hardly be said to have 'abandoned' it."); *United States v. Thomas*, 864 F.2d 843, 846, (D.C. Cir. 1989) ("The law obviously does not insist that a person assertively clutch an object in order to retain the protection of the fourth amendment.").

### B. The Decision Below Is Inconsistent With The Limited Authority From The Court That Has Addressed The Abandonment Exception.

The central issue in an abandonment analysis requires courts to "focus on the intent of the person who is alleged to have abandoned the place or object." *Thomas*, 864 F.2d at 846 (citing *United States v. Anderson*, 663 F.2d 934, 938 (9th Cir. 1981)). "To demonstrate abandonment, the government must establish by a preponderance of the evidence that the defendant's voluntary words or conduct would lead a reasonable person in the searching officer's position to believe that the defendant relinquished his property interests in the item searched or seized." *United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000) (citing *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000)).

While leaving a private residence, Dillard encountered armed police officers, who ordered, "put your hands up." Pet. App. 2a. Dillard dropped the briefcase, which landed four feet away. *Id.* Dillard neither fled the area nor disclaimed ownership of the briefcase. Thus, Dillard did not exhibit an objective manifestation of intent to abandon his briefcase. *See United States v. Garzon*, 119 F.3d 1446, 1452 (10th Cir. 1997) ("Every case in which we have found abandonment involved a situation where the defendant either (1) explicitly disclaimed an interest in the object, or (2)

unambiguously engaged in physical conduct that constituted abandonment.").

Dillard's subsequent struggle with officers led the Sixth Circuit to determine that Dillard dropped his briefcase to facilitate resisting arrest or "to place himself in a better position to attack police officers." Pet. App. 9a-10a, n.1. Notably, the district court had made no such findings. *See id.* at 32a-40a. The Sixth Circuit concluded that Dillard's privacy interest in the briefcase was not reasonable and therefore not subject to Fourth Amendment protection. *See id.* at 9a-10a, n.1.

The decision below is at odds with this Court's precedent in at least three respects. First, Fourth Amendment standing is predicated on whether society is prepared to recognize a privacy interest in the item subjected to search. *See Rakas v. Illinois,* 439 U.S. 128, 143 (1978). The owner of a locked briefcase has a legitimate privacy interest in its contents. *See United States v. Schleis,* 582 F.2d 1166, 1170 (8th Cir. 1978), *overruled on other grounds by United States v. Morales*, 923 F.2d 621 (8th Cir. 1991) (quoting *United States v. Chadwick*, 433 U.S. 1, 11 (1977)) ("By placing his personal effects inside a combination locked briefcase, Schleis clearly, in the language of *Chadwick*, 'manifested an expectation that the contents would remain free from public examination'."). The initial standing inquiry thus focuses on the nature of item searched; that is, whether it is an item in which society recognizes a privacy interest. It does not follow that the privacy interest in the contents of a locked briefcase is forfeited at the instant a person resists arrest or commits an unlawful act.

Second, *Hester*, as further explained in *Brower*, teaches that relinquishing an item in response to a police show of authority is not a voluntary act. Dillard was ordered to "put your hands up." The district court recognized that Dillard's actions were in the nature of a "reflexive reaction" to the officers' command. "[Y]ou are not likely going to fool

anyone by throwing a briefcase away in the presence of five or six officers, people often do something quickly out of instinct without doing a lot of thinking." Pet. App. 35a; *see also* Pet. App. 22a ("[Dillard] apparently dropped it in what appears to have been a reflexive reaction or an attempt at compliance with the officers' orders to raise his hands.") (Clay, J., dissenting). Whether Dillard also harbored a subjective desire to resist officers does not alter the fact that Dillard's actions immediately followed, and were consistent with, the officers' command. *See id.* at 24a, n.3.

Third, the *Smith* Court recognized that an attempt to protect property from search mitigates *against* any finding of abandonment. *Smith*, 494 U.S. at 543-44 ("[A] citizen who attempts to protect his private property from inspection . . . clearly has not abandoned that property."). The Sixth Circuit sought to distinguish *Smith* because Dillard dropped the briefcase and struggled with officers, rather than comply with the officers' instructions. *See* Pet. App. 8a-9a. That distinction is unfounded. In *Smith*, the defendant initially complied with instructions to "come here a minute," but subsequently "physically attempted to prevent Officer Thomas from seizing the bag." *State v. Smith*, 45 Ohio St. 3d 255, 263, n.6, 544 N.E.2d 239, 246 (1989).

The Court has never considered whether a person abandons property by resisting arrest. Nor has any other court, except the Sixth Circuit in the decision below. The decision below is inconsistent with *Hester* and *Smith* and should not stand as the sole authority on this issue. The Court should resolve the questions unanswered by prior cases and establish a clear standard for the lower courts and law enforcement.

## II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE LOWER COURTS CONCERNING WHETHER THE PERMISSIBLE SCOPE OF A SEARCH INCIDENT TO ARREST EXTENDS TO AN ARRESTEE'S LOCKED LUGGAGE

As an alternative basis for affirming the admission of evidence taken from the briefcase, the Sixth Circuit found that the search was lawful incident to Dillard's arrest. "'[W]hen a container is within the immediate control of a subject at the beginning of an encounter with law enforcement officers; and when the officers search the container at the scene of the arrest; the Fourth Amendment does not prohibit a reasonable delay, such as the one in this case, between the elimination of the danger and the search.'" Pet. App. 12a (quoting *United States v. Han*, 74 F.3d 537, 543 (4th Cir. 1996)). The dissent relied on *Chimel v. California,* 395 U.S. 752 (1969) and *United States v. Chadwick*, 433 U.S. 1 (1977), and their application in *United States v. Calandrella*, 605 F.2d 236 (6th Cir. 1979), to conclude that the search was unconstitutional because there were no exigent circumstances justifying it. Pet. App. 25a-27a (Clay, J., dissenting). The Sixth Circuit's differing views on proper application of the search incident to arrest exception mirrors a deep and persistent division among the lower courts.

### A. The Court's Precedent Leaves Unanswered Questions Concerning The Constitutionality Of Warrantless Searches Of Personal Luggage When An Automobile Is Not Involved.

The "search incident to arrest" exception was recognized in *Chimel v. California*. Police arrived at the defendant's house to arrest him pursuant to a warrant. 395 U.S. at 753. Following the arrest, the police searched the defendant's house to look for evidence of criminal activity. *Id.* at 753-54. The Court held that the defendant's arrest did not justify

the further intrusion of searching his home as an incident of that arrest. The scope of a proper search incident to arrest is limited to a "search of the arrestee's person and the area 'within his immediate control'—constructing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The rationale for allowing such a search is the protection of law enforcement officers and the preservation of evidence. *Id.* Consequently, a search incident to arrest "must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id.* at 762 (internal quotations omitted).

*United States v. Chadwick* applied *Chimel* to the context of a 200 pound locked footlocker seized from the defendant's car and searched an hour later at the police station. 433 U.S. at 4-5. In expounding on the "immediate control" test of *Chimel*, the Court stated: "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." *Id.* at 15 (citation omitted). The defendant did not forfeit his expectation of privacy in the locked container simply because he was under arrest. "With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." *Id.* at 13.

*New York v. Belton,* 435 U.S. 454 (1981) applied *Chimel* to the context of property found in an automobile during a search contemporaneous with the arrest of its occupants. Following the arrest, the officer searched the passenger compartment, noticed a jacket, unzipped it, and discovered cocaine. *Id.* at 456. The Court held that police officers who have lawfully arrested the occupant of an automobile may search the passenger compartment of the automobile, and any containers therein, but excluding the trunk. *Id.* at 459-

60, n.3. The Court sought to articulate a "single familiar standard" to guide law enforcement in the "particular and problematic context" of automobile searches. *Id.* at 458, 460. The decision "[i]n no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searching incident to lawful custodial arrests." *Id.* at 460, n.3.

In *United States v. Robinson*, 414 U.S. 218 (1973), the Court held that following an arrest, police may search an arrestee and objects "immediately associated" with him. *Id.* at 236. *Chadwick* specifically rejected application of the *Robinson* doctrine to personal possessions, such as luggage. *Chadwick*, 433 U.S. at 16, n.10 ("Unlike searches of the person, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectation of privacy caused by the arrest.") (citations omitted).

In *Arkansas v. Sanders*, 442 U.S. 753 (1979), the Court applied *Chadwick* to hold that a warrantless search permitted under the automobile exception did not extend to luggage in the trunk of an automobile. *Id.* at 763-64. *Sanders* limited its inquiry to the validity of the search under the automobile exception, and expressly declined to consider "the constitutionality of searches of luggage incident to the arrest of its possessor." *Id.* at 764, n.11.

*Sanders* was effectively overruled in *California v. Acevedo*, 500 U.S. 565 (1991), where the Court held that police may search a container within an automobile where they have probable cause to believe that the container contains contraband or evidence. *Id.* at 580. The concurring and dissenting opinions acknowledged the absence of clear rules for containers *not* carried in automobiles, resulting in "anomalous" decisions. *See id.* at 593 (Stevens, J., dissenting) ("[A]s I read the opinion, the Court assumes that the police could not have made a warrantless inspection of the bag before it was placed in the car."); *see also id.* at 581

(Scalia, J., concurring) ("I agree with the dissent that it is anomalous for a briefcase to be protected by the 'general requirement' of a prior warrant when it is being carried along the street, but for that same briefcase to become unprotected as soon as it is carried into an automobile.").

Thus, a custodial arrest allows the police to search a person and objects immediately associated with the person (*Robinson*), but not including luggage that has been removed from the arrestee and transported to the police station (*Chadwick*). Officers may also search the area within the arrestee's immediate control (*Chimel*), which includes the interior of an automobile, but excluding the trunk (*Belton*), and any containers located anywhere in a vehicle (including the trunk) that police have probable cause to believe to contain contraband (*Acevedo*). These cases do not directly answer the question of whether a search incident to arrest is permissible in the simple context of person carrying a briefcase when an automobile is not involved.

### B. The Lower Courts Are Divided On The Question Of Whether *Belton* Re-defines *Chimel*'s Area Of "Immediate Control" To Permit Searches Of Briefcases And Similar Containers Incident To An Arrest.

Some Courts of Appeals have reasoned that because the jacket searched in *Belton* was within the officer's exclusive control at the time of the search, *Belton* stands for the broad proposition that *Chimel*'s area of "immediate control" means an arrestee's area of control immediately prior to the arrest, and not at the time of the search. These circuits have thus extended *Belton* to conclude that any container in the possession of an arrestee immediately prior to a police encounter may be searched without regard to whether the *Chimel* factors justify the search. Other Courts of Appeals have declined to extend *Belton* beyond automobiles and have found the rationale underlying *Chimel* and *Chadwick* dispositive; that is, whether the search was necessary to

prevent the arrestee from procuring a weapon or destroying evidence. State courts of last resort are also divided. *See, e.g., Vasquez v. Wyoming,* 900 P.2d 476, 483 (Wyo. 1999) (collecting and discussing cases); *State v. Pierce,* 136 N.J. 184, 201-02; 642 A.2d 947, 955-56 (1995) (same).

### 1. Fourth, Seventh, Eighth And District Of Columbia Circuits

The Courts of Appeals for the Fourth, Eighth and the District of Columbia Circuits have expressly relied on *Belton* to conclude that if a container is within the arrestee's immediate control at the time of the arrest, a search conducted contemporaneously with the arrest is valid *per se*. In *United States v. Litman*, 739 F.2d 137 (4th Cir. 1984) (*en banc*), the defendant challenged the warrantless search of a shoulderbag that he dropped immediately prior to arrest, and that the police searched while the defendant was detained at gunpoint. *See id.* at 138. The Fourth Circuit relied upon *Belton* in determining that the search was permissible because "the seizure of the shoulderbag was contemporaneous with the defendant's arrest and frisk and search followed instantly." *Id.* at 139. Two judges concurred separately to emphasize that the search was justified by what they viewed as exigent circumstances, "not from what I regard as an unsound reading of *Belton*." *Id.* (Murnaghan and Winter, JJ., concurring).

The Eighth Circuit changed course on the search incident to arrest exception as a direct result of *Belton*. In *United States v. Schleis*, 582 F.2d 1166 (8th Cir. 1978) (*en banc*), the court held that the search of the defendant's briefcase at a police station violated the Fourth Amendment, because "[o]nce the officers obtain exclusive control the requirement for a warrant under *Chadwick* is triggered." *Id.* at 1172. The *Schleis* court found that officers obtained exclusive control of the briefcase by seizing it at the time of arrest. *Id.* But in *United States v. Morales*, 923 F.2d 621 (8th Cir. 1991), the Eighth Circuit upheld the warrantless search of a duffel bag

taken from the defendant at arrest and searched at the scene, reasoning, in part, that "*Belton* . . . abolishes the exclusive control distinction of *Chadwick* when the search is contemporaneous with the arrest." *Id.* at 627. The *Morales* court overruled *Schleis* and another case "to the extent that they held that a police officer's 'exclusive control' is enough to trigger the warrant requirement . . . ." *Id.*

The District of Columbia Circuit has also extended *Belton* beyond the automobile context. *See United States v. Abdul-Saboor*, 85 F.3d 664, 665 (D.C. Cir. 1996) ("To the extent that *Belton* might be thought only to apply to automobiles, however, we have already rejected that interpretation.") (citation omitted). The Seventh Circuit appears to favor an extension of *Belton* as well. *See, e.g., United States v. Queen*, 847 F.2d 346, 354 (7th Cir. 1988) (citing *Belton* along with non-vehicular cases in affirming search of bag located in house where defendant arrested); *United States v. Fleming*, 677 F.2d 602, 607 (7th Cir. 1982) (citing *Belton* in upholding warrantless search of defendant's bag five minutes after defendant arrested and in handcuffs; item searched was within arrestee's immediate control at time of arrest and search immediately followed).

**2. Second, Third And Fifth Circuits**

In *United States v. Myers*, 308 F.3d 251 (3d Cir. 2002), the Third Circuit expressly rejected the Fourth Circuit's extension of *Belton* beyond automobiles. The police searched a suspect's school bag while the suspect was face-down on the floor, handcuffed, and guarded by two police officers. *Id.* at 253-54. The Third Circuit reversed the district court's order denying the defendant's suppression motion, because there was no likelihood that the suspect could access the bag to obtain a weapon or destroy evidence. *Id.* at 271. Commenting on the Fourth Circuit's *Litman* decision, decided on similar facts, the court stated: "[T]he *Litman* court concluded that *Belton* controlled its analysis without even acknowledging that *Belton* was an automobile

search. The *Litman* court therefore read far more into *Belton* than the Supreme Court intended." *Id.* *But see id.* at 284-86 (Alarcon, J., dissenting) (citing cases that had relied upon *Belton* and *Litman* as justifying the search).

The Fifth Circuit has also strictly construed *Belton*, finding its rationale inapplicable to the search of a briefcase located six to eight feet from the defendant at the time of search. *United States v. Johnson*, 16 F.3d 69, 73 (5th Cir.), *clarified on rehearing*, 18 F.3d 293 (1994) ("We decline the government's request to extend *New York v. Belton* to office searches. *Belton* make clear that its holding is limited to its facts and merely serves as an explication of *Chimel* with respect to interior searches of an automobile."). The Second Circuit has not specifically addressed *Belton* in the context of luggage searches, but has reached results consistent with the Third and Fifth Circuits. *See United States v. Gorski*, 852 F.2d 692, 695 (2d Cir. 1988) (warrantless search of bag was not incident to arrest where bag was searched at arrest scene after defendant handcuffed; affirming district court finding that "[t]here was neither a risk of a defendant getting to a weapon in the bag nor a risk of a defendant destroying or absconding with evidence from the bag.").

**3. Ninth and Tenth Circuits**

The Ninth and Tenth Circuits have extended *Belton* to searches not involving automobiles in some cases, but not others. In a decision rendered shortly after *Belton*, the Ninth Circuit stated: "Any extension beyond the exact limits set by *Belton* (objects within the passenger compartment of the vehicle) would open a new set of temporal and spacial uncertanties, as well as increase the likelihood of unjustified invasion of the privacy of individuals." *United States v. Vaughan*, 718 F.2d 332, 333-34 (9th Cir. 1983) (affirming suppression of evidence taken from warrantless search of briefcase). More recently, the Ninth Circuit expressly adopted the Seventh Circuit's decision in *Fleming*, which in turn had relied in part upon *Belton*. *United States v. Turner*,

926 F.2d 883, 888 (9th Cir. 1991) (relying on *Fleming* in affirming warrantless search of bag after defendant handcuffed and taken to another room).

Similarly, in *United States v. Herrera*, 810 F.2d 989 (10th Cir. 1987) (*per curiam*), postal inspectors arrested the defendant as he walked out of the building where he worked, seized his briefcase, and conducted a warrantless search that yielded incriminating documents. *Id.* at 989. Citing *Belton*, the Tenth Circuit stated: "It is difficult to see how there could be a search and seizure during the course of a lawful arrest if a scenario such as this is not upheld." *Id.* at 990. However, in a subsequent decision, the Tenth Circuit rejected the application of *Belton* to the search of a jewelry box that occurred at a police station after an arrest. *United States v. Butler*, 904 F.2d 1482, 1484-85 (10th Cir. 1990).

### C. A Clear Rule Is Needed To Guide Law Enforcement And The Courts.

*Chimel* and *Chadwick* support an argument that police cannot search closed luggage incident to an arrest unless the exigencies of the situation demand it. *See, e.g., Johnson,* 16 F.3d 69; *Myers,* 308 F.3d 251; *Gorski,* 852 F.2d 692. *Belton* supports an argument that an arrest justifies the additional intrusion of a search, provided that the luggage was in the arrestee's possession immediately preceding the encounter with law enforcement. *See, e.g., Morales*, 923 F.2d 621; *Litman,* 739 F.2d 137; *Turner*, 926 F.2d 883. The lower courts do not agree about which rule governs. "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Belton*, 453 U.S. at 459-60.

The *Sanders* Court noted that "an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights." 442 U.S. at 757. The Court's observation applies

equally in the present case. The debate about *Belton*'s application beyond automobile searches, and how the decision should be construed with *Chimel* and *Chadwick*, is analogous to the debate concerning the "automobile exception" that persisted prior to *California v. Acevedo*, 500 U.S. 565, 580 (1991). The Court in *Acevedo* recognized, "[u]ntil today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences." *Id.* at 580. Justice Scalia's concurring opinion recognized that the Court's precedent seemingly precludes the police from stopping an individual on the street and demanding to see the contents of a briefcase reasonably believed to contain contraband. *See id.* at 584 (Scalia, J., concurring). That question has never been squarely answered.

## III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE LOWER COURTS CONCERNING APPLICATION OF THE INEVITABLE DISCOVERY DOCTRINE TO INVENTORY SEARCHES

The Sixth Circuit determined that the contents of Dillard's briefcase inevitably would have been discovered during a hypothetical inventory search that "in all likelihood" would have eventually occurred, but which the court acknowledged did not occur. *See* Pet. App. 14a; *see also id.* at 4a (second mistrial resulted when police found razor blade in briefcase that was not previously discovered).

The "inevitable discovery" doctrine allows illegally procured evidence to be admitted against a defendant "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984).

Although distinct from the "independent source" exception (*see Murray v. United States*, 487 U.S. 533, 538-39 (1988)), the inevitable discovery doctrine encompasses an independent source requirement. In *Nix*, incriminating statements obtained in violation of the Sixth Amendment led police to the location of a murder victim's body. The Court held that the Sixth Amendment violation did not warrant suppression of evidence concerning the body, because a large search party led by different officers, called off only when police obtained the illegal confession, would have inevitably discovered the body absent the confession. *See* 467 U.S. at 448-450. The controlling factor in *Nix* was that a search party had in fact been assembled and was actively looking for the body. *See id.* at 448-50. The decision would have been decided differently if the government had merely claimed that a hypothetical search party would have been assembled at some point in the future. *See id.* at 444-45, n.5 ("[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment. . . .").

A number of lower courts have extrapolated *Nix* for the proposition that if evidence obtained during an unlawful search would have been discovered later during an inventory, the exclusionary rule does not bar admission of the evidence. These courts ignore the independent source requirement, reasoning that because a hypothetical inventory search was permissible, the evidence inevitably would have been discovered if the police had followed lawful inventory procedures. *See, e.g., United States v. Mendez*, 315 F.3d 132, 138 (2d Cir. 2002) (gun and drugs found in glovebox during roadside search would have been discovered during subsequent inventory of vehicle); *United States v. Haro-Salcedo*, 107 F.3d 769, 773 (10th Cir. 1997) (drug evidence seized during unlawful inventory search by DEA agents would inevitably have been discovered during subsequent inventory by local police); *United States v. Woody*, 55 F.3d 1257, 1270 (7th Cir. 1995) (even if roadside search of

glovebox was unlawful, stolen checks would have inevitably been discovered during subsequent inventory of the car); *United States v. George*, 971 F.2d 1113, 1121-22 (4th Cir. 1992) (inevitable discovery exception applied to evidence seized from truck; remanding for determination of whether inventory would invariably have occurred). These courts require record evidence that an inventory of the arrestee's possessions would in fact have been conducted in accordance with lawful inventory procedures. *See id.; see also United States v. Gorski*, 852 F.2d 692, 696 (2d Cir. 1988) (reversing denial of suppression motion where no evidence presented that bag containing drugs would have been inventoried).

The court in *United States v. $639,558*, 955 F.2d 712 (D.C. Cir. 1992) recognized the consequences of ignoring the independent source requirement. Police searched a train passenger's bags without a warrant. *Id.* at 74. The court rejected application of the inevitable discovery doctrine and affirmed suppression of money and evidence found in the luggage, stating:

> If the evidence stemming from the violation is nevertheless admissible on the basis that the bags inevitably would have been opened when they were later inventoried, the practical consequence is apparent. In the vast run of cases, there would be no incentive whatever for police to go to the trouble of seeking a warrant (or, we should add, of waiting for a lawful inventory to occur during normal processing).

*Id.* at 720-21.

The Sixth Circuit acknowledged that "[t]here is no evidence in the record" of whether the police would have inventoried Dillard's possessions, but that "in all likelihood" such an inventory would have occurred. Pet. App. 14a. The possibility that an inventory would have occurred was deemed sufficient to render the discovery of the evidence in the briefcase "inevitable." The Sixth Circuit's decision was

erroneous even under the authorities that have ignored *Nix*'s independent source requirement. *See Woody*, 55 F.3d at 1270 (remanding for determination of whether inventory would have occurred); *Gorski*, 852 F.2d at 692 (same).

This issue deserves the Court's immediate attention. That police may be entitled to inventory an arrestee's possessions at the station house to protect themselves against claims of lost property cannot justify a warrantless, arrest-scene search conducted solely to gather evidence. If the fruits of a warrantless search are admissible whenever an inventory could have been conducted, there simply is never any need for police to obtain a warrant before opening an arrestee's locked luggage. Warrantless arrest-scene searches would be excused in all instances where the police can establish that they have an inventory policy that they could have followed, but chose not to. *Belton* and *Chadwick* would never have been decided. Left unchecked, the next logical extension of the inevitable discovery doctrine is that evidence obtained from a warrantless search will be admitted where police had probable cause to seek a search warrant, and a magistrate "inevitably" would have issued one if the police had bothered to ask. The Court must immediately halt the further and unwarranted extension of the inevitable discovery doctrine.

## CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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March 2004

# APPENDIX

**United States Court of Appeals,**
**Sixth Circuit.**

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bruce DILLARD, Defendant-Appellant.

No. 01-3743.

Oct. 20, 2003.

Before CLAY and GIBBONS, Circuit Judges, and CLELAND, District Judge.*

Robert H. CLELAND, District Judge.

Bruce Dillard was convicted of two counts of distributing cocaine base; possessing with the intent to distribute cocaine base; using, carrying, and brandishing a firearm in relation to a drug-trafficking crime; and being a convicted felon in possession of a firearm. He challenges his conviction on several grounds, arguing that (1) evidence of ninety-nine grams of cocaine base found in his briefcase should have been suppressed because its seizure violated his Fourth Amendment rights, (2) the jury should have been instructed on the lesser included offense of simple possession, (3) his trial counsel was ineffective for failing to present evidence supporting the lesser included offense of simple possession, and (4) the weapons conviction should be reversed if the underlying drug conviction is reversed. For the following reasons, Dillard's conviction is affirmed.

## I. FACTUAL BACKGROUND

In May 1999, police officers began investigating a two-story apartment house located at 7433 Clemont Avenue, Cleveland, Ohio, as a result of complaints about drug activity at that address. Using an informant, the officers made two

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* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

controlled buys of cocaine base (crack) from Dillard. The first, on May 6, 1999, occurred at that address, and the second, on May 12, occurred just after Dillard left that address. Each time, Dillard sold the officer an amount of crack worth sixty dollars.

On May 26, 1999, the police obtained a search warrant for the upper residence at 7433 Clemont. The police were also aware that there was a felony warrant on an unrelated matter for Dillard's arrest at that time. Seven officers approached the side door of the apartment in a single file line, and three other officers were stationed around the house for security. As the police approached the premises, they observed Dillard and another male, Steven Piskach, exiting the residence from the side door. Dillard was carrying a briefcase. Sergeant Thomas Acklin announced "Police, search warrant," or "Police, put your hands up," or words to that effect. At that time, Dillard and Piskach were outside the house, in the driveway.

Dillard then tossed the briefcase onto the ground. He had been holding it in his right hand and threw it to the left. According to the testimony of detectives James Kennelly and Bienvenido Santiago, the briefcase "went flying" and landed about four feet away. Dillard began to struggle with the officers and, with his right hand, he pulled a loaded 9mm gun (later determined to contain ten rounds of ammunition) from his waistband. In an altercation lasting forty-five seconds to a minute, the officers moved Dillard onto the ground and removed the loaded gun from his hands.

Dillard was placed under arrest. The police opened Dillard's briefcase and discovered 99.21 grams (or about 3.5 ounces) of crack, an inoperable weapon, assorted drug paraphernalia, and plastic bags used for packaging cocaine. Sergeant Acklin, qualified as an expert in narcotics enforcement, estimated that the street value of the crack recovered from Dillard's briefcase could be $3,000 to $4,000 if sold in ounces or "almost $10,000 worth" if sold in $20 "rocks."

## II. PROCEDURAL HISTORY

On June 30, 1999, a federal grand jury indicted Dillard on three counts: (1) possession with intent to distribute approximately 3.5 ounces of cocaine base, in violation of 21 U.S.C. § 841; (2) using, carrying, and brandishing a firearm in relation to drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and (3) possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

Dillard moved to suppress the evidence found in the briefcase, and the district court held an evidentiary hearing on November 18, 1999. The district court denied Dillard's motion to suppress, finding that the search of the briefcase was incident to a lawful arrest and that the contents of the briefcase would have been inevitably discovered through an inventory search. The court also noted that "certainly there is more evidence than not" that Dillard discarded the briefcase, but at that time declined to address whether Dillard lacked standing to challenge the admission of the evidence because he had abandoned the briefcase.

The government filed an Amended Notice of Enhancement on December 22, 1999, which enhanced the statutory minimum for Count One from ten years to life without parole based on Dillard's prior convictions. On February 18, 2000, Dillard filed a renewed motion to suppress the evidence seized from the briefcase, but it was denied for the same reasons as the original motion. At the conclusion of Dillard's trial, on March 3, 2000, the jury returned guilty verdicts on all counts. On May 4, 2000, however, the district court declared a mistrial. The reason for the mistrial was the accidental inclusion of a search warrant affidavit in the exhibits provided to the jury.

On May 30, 2000, Dillard was named in a five-count superseding indictment charging him with the same three counts, plus two counts of distributing cocaine base in violation of 21 U.S.C. § 841. On September 8, 2000, Dillard filed a renewed motion to suppress the evidence found in his briefcase, and the district court denied the motion because it

found that Dillard had abandoned the briefcase when he discarded it, such that he lacked standing to raise a Fourth Amendment challenge. Alternatively, the district court ruled that the search of the briefcase was incident to a lawful arrest, or that the contents of the briefcase would have been inevitably discovered during a routine inventory search.

On September 19, 2000, the government filed a Second Amended Notice of Enhancement that enhanced the statutory minimum for Count Three from ten years to life without parole. On November 15, 2000, Dillard filed another motion to suppress the briefcase evidence, but the motion was orally withdrawn two days later at a pretrial conference. The second jury trial commenced on November 27, 2000. It also resulted in a mistrial when, after the first day of trial, the police found a razor blade in the briefcase that had not been previously discovered.

The third and final jury trial commenced on February 26, 2001. On March 1, 2001, the jury returned guilty verdicts on all five counts charged in the superseding indictment. Dillard was sentenced to life without parole for the conviction under Count Three and to a consecutive seven year term for the conviction under Count Four. Dillard filed a timely appeal.

## III. STANDARD OF REVIEW

A district court's factual findings made in considering a motion to suppress evidence will be upheld unless they are clearly erroneous, and its legal conclusions are subject to *de novo* review. *United States v. Williams,* 962 F.2d 1218, 1221 (6th Cir. 1992).

Where, as here, a defendant fails to request or object to a jury instruction, we review only for plain error. Fed. R. Crim. P. 30; *United States v. Pearce,* 912 F.2d 159, 163 (6th Cir. 1990). An error is "plain" if it is "clear under current law" and "affected the outcome of the district court proceedings." *United States v. Olano,* 507 U.S. 725, 734 (1993). Our authority to correct a plain error is discretionary

and should be employed only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (internal quotations and citations omitted).

## IV. DISCUSSION

### A. Admission of Briefcase Evidence

Dillard challenges the admission of the evidence found in the briefcase, arguing that the search of the briefcase violated his Fourth Amendment rights. The government argues that Dillard lacks standing to raise this claim, because Dillard abandoned the briefcase by throwing it on the ground. A defendant charged with a crime of possession may claim the benefits of the exclusionary rule only if his Fourth Amendment rights have in fact been violated, *United States v. Salvucci,* 448 U.S. 83, 85 (1980), and search and seizure of abandoned property does not violate the Fourth Amendment. *Abel v. United States,* 362 U.S. 217, 241 (1960). Thus, the first question for review is whether Dillard abandoned the briefcase.

The term "abandonment," in this context, does not refer to traditional concepts of property law. *United States v. Tolbert,* 692 F.2d 1041, 1044 (6th Cir. 1982). Rather, the capacity to claim the protection of the Fourth Amendment depends "upon whether the person who claims the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* (quoting *Rakas v. Illinois,* 439 U.S. 128, 143 (1978)). The Supreme Court has noted that the concept of a "legitimate expectation of privacy" incorporates two elements: (1) whether an individual's conduct has exhibited such an expectation, and (2) whether the individual's subjective expectation of privacy is one that society is prepared to accept as reasonable under the circumstances. *Id.* The defendant bears the burden of demonstrating standing by showing that he had a legitimate expectation of privacy in the searched item. *See Rakas,* 439 U.S. at 130 n.1 ("The proponent of a motion to suppress has the burden of

establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.").

For the reasons set forth below, we affirm the district court's ruling that Dillard abandoned the briefcase. The question of abandonment is a mixed question of law and fact, and the district's court's resolution of any factual issue is entitled to great deference. *United States v. Oswald,* 783 F.2d 663, 666 (6th Cir. 1986). The district court's findings were as follows:

> I'm going to deny the defendant's motion to suppress. I'm going to specifically find-denying it for several grounds. First, I do not believe the defendant has standing to object because the evidence showed that the defendant had abandoned that briefcase by throwing it away prior to his being apprehended. That's the evidence I found, and I made those findings last November [18, 1999, after an evidentiary hearing], and I believe they were correct.

(09/13/00 Tr. at 3-4.) At the earlier evidentiary hearing, the district court had stated that "there is more evidence than not that [Dillard] discarded that briefcase," (11/18/99 Tr. at 154) and "the evidence is that Mr. Dillard flung [the briefcase] away when he saw the officer." (*Id.* at 155.) Further, although "you are not likely going to fool anyone by throwing a briefcase away in the presence of five or six officers, people often do something quickly out of instinct without doing a lot of thinking." (*Id.*)

Abandonment is primarily a question of intent, and intent my be inferred from words, acts, and other objective facts. *United States v. Colbert,* 474 F.2d 174, 176 (5th Cir. 1973). When a person has disclaimed ownership of a discarded item or container, courts have repeatedly held that the person has no legitimate expectation of privacy in the item or container and has thus abandoned it. *United States v. Torres,* 949 F.2d 606 (2d Cir. 1991); *United States v. Frazier,* 936 F.2d 262 (6th Cir. 1991); *United States v. Knox,* 839 F.2d 285 (6th Cir. 1988); *United States v. Tolbert,* 692 F.2d 1041 (6th Cir. 1982). By contrast, defendants who assert an interest in the

item are held not to have abandoned the item. *Smith v. Ohio,* 494 U.S. 541, 543-44 (1990) ("[A] citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to police officer's inquiry, clearly has not abandoned that property."); *United States v. Sanders,* 719 F.2d 882, 886 (6th Cir. 1983) (where defendant consistently refused to consent to search of the suitcase, she did not abandon it). In this case, Dillard neither verbally disclaimed ownership of the briefcase, nor did he make any attempt to protect it from search and seizure. The question of abandonment, then, must be decided based on Dillard's actions and on the circumstances surrounding the alleged abandonment.

One of the most crucial facts of an abandonment case is the location of the object in question. Dillard cites *Commonwealth v. Straw,* 422 Mass. 756, 665 N.E.2d 80 (1996), where the defendant had tossed a briefcase from the window of his house into his fenced backyard as police approached the house with an arrest warrant. The court held that Straw had not abandoned the briefcase, but rather had "intended to protect his property from any public scrutiny because he placed the property in a closed and locked briefcase and disposed of the briefcase by throwing it into the fenced-in curtilage of his family's home, an area enjoying full Fourth Amendment protection from search by the authorities." *Id.* at 83.

In contrast, when a teenager, immediately prior to an encounter with police, threw a paper bag to the ground on a public street, it was found that he "no longer had any reasonable expectation of privacy in the property which he discarded because he divested himself of all possession therein by dropping it in a place where the public had complete access." *State v. Oliver,* 368 So. 2d 1331, 1336 (Fla. Dist. Ct. App. 1979). Likewise, when police approached two women exiting a bank, and one of them dropped an envelope to the ground in the parking lot, the police were justified in recovering and examining the

contents of the envelope. *United States v. Sims,* 808 F. Supp. 596, 604 n.14 (N.D.Ill. 1992) ("By dropping the envelope, defendants effectively abandoned the envelope and its contents (a safe deposit key) and thus have no legitimate expectation of privacy in these items.").

Again, this case falls into the middle ground. Dillard threw the briefcase to the ground near the side door of a house he had been visiting. The location was not as open as a public street or parking lot, but neither was it entirely private. In this respect, the instant case resembles *United States v. Morgan,* 936 F.2d 1561 (10th Cir. 1991). The defendant in *Morgan* fled from police to the house of an acquaintance, attempting to enter through the back door. Unable to gain entry into the house, the defendant "threw the tan bag he was carrying to the south side of the porch and headed back down the porch stairs in the direction of [the police]." *Id.* at 1565. The Tenth Circuit found that Morgan had "abandoned the gym bag and any privacy interests he had in it." *Id.* at 1570. "The fact that Mr. Morgan was in the backyard of someone he knew or was acquainted with, at the time he threw the bag, is of little significance. The record reveals we do not have before us a case where the item was left to the care or responsibility of another, or where there is a delayed indication of an intent to retain an expectation of privacy in the item." *Id.* Dillard, like Morgan (but unlike Straw, above), was not attempting to secrete the container in a place where he had an expectation of privacy, but rather discarded the item in his attempt to avoid arrest.

Indeed, Dillard's resistance to police merits further discussion. Contrary to Dillard's argument, this case does not resemble *Smith v. Ohio,* 494 U.S. 541 (1990) or *Bryan v. State,* 760 So. 2d 246 (Fla. App. 2000). In those cases, the defendants dropped or discarded items in compliance with police instructions. In *Smith,* after the police identified themselves, the defendant tossed the bag he was carrying onto the hood of his car and turned to interact with the police, who had asked him to "come here a minute." 494

U.S. at 542. As mentioned above, the defendant then attempted to protect his bag from a police search. In *Bryan,* the defendant dropped a bag when police ordered him to freeze. He then followed police orders to lie down on the ground and was handcuffed. 760 So. 2d at 247.

There are obvious reasons for courts to give the benefit of the doubt to defendants who drop items while complying with police instruction. There would be a serious potential for abuse if police could compel an arrested to "abandon" property on his person, which would then be fair game for a warrantless search. However, when a person discards an item as part of an attempt to resist arrest, courts have repeatedly found that the person abandoned the item.

In one such case, we held that a defendant's heaving a shoulder bag over a fence while the police pursued him constituted abandonment. *United States v. Collis,* 766 F.2d 219, 222 (6th Cir. 1985). We stated, "In our view, the defendant abandoned the shoulder bag and failed to establish a legitimate subjective expectation of privacy which would confer standing to raise a fourth amendment challenge to the agent's search of the bag." *Id.* Although Dillard dropped the item and grabbed his gun, rather than dropping it and fleeing, as the defendant in *Collis* did, *Collis* is sufficiently similar to Dillard's case to warrant the same result. Likewise, in *Morgan,* the defendant was found to have abandoned his bag when he discarded it and moved toward the police, rather than fleeing.[1]

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[1] Our colleague in dissent finds no abandonment in this case by attempting to distinguish the myriad of cases holding that a defendant disclaims ownership in the relevant property by tossing or dropping it in order to flee from the police. According to the dissent, this case requires a different outcome because Dillard did not move away from the officers or attempt to elude the officers, but rather attacked the officers with a handgun pulled from his waistband. We cannot agree. Whether a suspect drops a cumbersome item to assist in his escape or drops the item to attack the officers, such actions evince an intent to leave the item behind, *i.e.*, to abandon it. *See Morgan,* 936 F.2d at 1570 (finding

Another line of relevant cases deals with defendants who, immediately prior to a police encounter, throw away items containing incriminating evidence. One such case is *United States v. Park,* 142 F.3d 437 (Table), 1998 WL 69028 (6th Cir. 1998), in which the defendant leaned out the door of his mobile home and dropped a thermos on the ground as police approached. The thermos contained methamphetamine, and Park moved to suppress the evidence. However, the district court denied his motion, and we affirmed, stating, "the deputies observed Park in the act of throwing the thermos away. There is no reasonable expectation of privacy in an object after it has been thrown away, and the Fourth Amendment offers no bar to its seizure." *Id.* at *1. We cited *United States v. Jabara,* 618 F.2d 1319, 1324-25 (9th Cir. 1980) (seizure of "shopping bag containing over ten pounds of cocaine and heroin, which had been dropped out the window of the [defendant's] residence, was justified on the theory of abandonment") (*overruled on other grounds by United States v. DeBright,* 730 F.2d 1255, 1259 (9th Cir. 1984)) and *United States v. Arboleda,* 633 F.2d 985, 991-92 (2d Cir. 1980) (seizure of package of cocaine defendant tossed onto ledge outside window of his apartment upheld on abandonment grounds). Like the defendant in *Park,* Dillard threw the item on the ground when he realized the police were approaching. The district court found that Dillard's conduct did not exhibit an expectation of privacy in the briefcase, and Dillard failed to show that this finding was clearly erroneous. Therefore, the Court affirms the denial of Dillard's motion to suppress.

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abandonment when the defendant threw the bag and moved toward the officer before being apprehended). In any event, even if Dillard had a subjective expectation of privacy in the discarded briefcase, society would not recognize such an expectation as reasonable under the circumstances (*i.e.*, where the suspect throws a bag so as to place himself in a better position to attack police officers). *See Shamaeizadeh v. Cunigan,* 338 F.3d 535, 544 (6th Cir. 2003) (court must determine whether society is "prepared to recognize [the defendant's] expectation as legitimate").

Moreover, the district court had two alternate grounds for admitting the evidence found in the briefcase. First, it held that, even if Dillard did not throw away or abandon his briefcase, "a search of the briefcase was proper as a proper search incident to a lawful arrest . . . [I]t would be appropriate and prudent to search the person of the defendant and the area within his immediate control and various things in his control." (09/13/00 Tr. at 4.) We find no error in this holding. *See Chimel v. California,* 395 U.S. 752, 763 (1969) (pursuant to a lawful arrest, police may search any evidence on the arrestee's person as well as the area into which an arrestee might reach in order to grab a weapon or evidentiary item).

Dillard argues that *United States v. Chadwick,* 433 U.S. 1 (1977), prohibits any warrantless search of personal property which has been seized from an arrestee and subsequently reduced to the exclusive control of the police.

> [W]arrantless Searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest" . . . or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

*Id.* at 15 (citation omitted). Dillard asserts that, because he had been handcuffed and could not reasonably have reached the briefcase, no exigency existed, and that the police had reduced the briefcase to their exclusive control.

Exigency is defined as "[a] situation demanding swift attention or action." *American Heritage Dictionary* 247 (1988). Even after an arrest scene has been made relatively secure, the situation often remains pressing and urgent. Indeed, even the *Chadwick* Court recognized "[t]he potential

dangers lurking in all custodial arrests." 433 U.S. at 14-15. The mere fact that an arrestee has been subdued and handcuffed in no way signals the end of exigent circumstances, and cannot preclude a search of the arrestee's person and surrounding area.

We have recently distinguished *Chadwick* and *United States v. Calandrella,* 605 F.2d 236 (6th Cir. 1979), in which the searches occurred at a police station, from cases in which the search was conducted at the scene of the arrest. *United States v. Blevins,* 234 F.3d 1270 (Table), 2000 WL 1597821, *1 (6th Cir. 2000). Dillard admits that the search made by the officers in *Blevins* occurred under exigent circumstances, even though Blevins was handcuffed and lying on the ground. *Id.* at *2. In *Blevins,* we noted that "[f]ederal courts have consistently recognized that arresting officers are privileged to search a suspect's baggage at the same time of the arrest even though the danger to the officers or the risk of evidence destruction has passed." *Id.* at *3. We then cited numerous cases upholding searches performed after police had handcuffed the suspect. *See United States v. Mitchell,* 64 F.3d 1105, 1110-11 (7th Cir. 1995), *cert. denied,* 517 U.S. 1158 (1996) ("We do not believe that Johnson's handcuffing destroyed Lewellen's justification for searching the briefcase."); *see also United States v. Nohara,* 3 F.3d 1239 (9th Cir. 1993); *United States v. Fleming,* 677 F.2d 602 (7th Cir. 1982).

When the police approached Dillard to arrest him, he was carrying a briefcase, which he then discarded. After police arrested and subdued a violently struggling Dillard, they then searched the briefcase he had originally been carrying. This action epitomizes the doctrine of search incident to arrest. "[W]hen a container is within the immediate control of a subject at the beginning of an encounter with law enforcement officers; and when the officers search the container at the scene of the arrest; the Fourth Amendment does not prohibit a reasonable delay, such as the one in this case, between the elimination of the danger and the search."

*United States v. Han,* 74 F.3d 537, 543 (4th Cir.), *cert. denied*, 517 U.S. 1239 (1996). The district court had ample grounds for its conclusion that the search of Dillard's briefcase was incident to a lawful arrest, and we affirm its ruling.

The district court had a second alternate ground for admitting the evidence found in Dillard's briefcase: "[T]he contents of that briefcase would have been inevitably discovered, because even if for some reason the briefcase hadn't been searched at the time of the arrest . . . [it] would have been searched as an inventory search at some point after the arrest." (09/13/00 Tr. at 4.)

Dillard argues that the search of the briefcase was not a lawful inventory search. Even if this were correct, it is irrelevant. The inevitable discovery doctrine examines what would have transpired if the warrantless search had not taken place, rather than what actually occurred. *See United States v. Kennedy,* 61 F.3d 494, 500 (6th Cir. 1995). In *Kennedy,* an airline employee, pursuant to an established policy, opened one of two misrouted suitcases searching for identification. *Id.* at 496. When she found $176,000, the employee notified the police. *Id.* At the employee's request, the police assisted her in breaking open the second suitcase, which turned out to contain 17 kilograms of cocaine. *Id.*

In *Kennedy,* we found that the police's actions constituted an illegal search. Nevertheless, we found no error in admitting the evidence under the inevitable discovery rule, as follows:

> The police misconduct in this case was the warrantless search of the black suitcase, thus the Court must consider what would have happened had the illegal search not occurred. Had the police acted lawfully, once the bag was seized and it was determined that it posed no danger of exploding, they would have sought a search warrant. The government concedes that under the facts of this case, it is unlikely that a search warrant would have been issued . . . If the police had been unable to secure a warrant, they

> would have been required to return the suitcase to Northwest Airlines unopened. Northwest would then have opened the suitcase, pursuant to its lost luggage policy, in an effort to locate its owner.

*Id.* at 500. Thus, even if police had refrained from an illegal search, the cocaine would have been discovered and turned over to the police by the private airline, which had no Fourth Amendment restrictions. *Id.*

In Dillard's case, the police removed items from the briefcase and entered them onto the inventory sheet. If Dillard did not abandon the briefcase, it was still in his possession, and examining items removed from the arrestee's person or possession and listing them is "an entirely reasonable administrative procedure." *Illinois v. Lafayette,* 462 U.S. 640, 646 (1983) (upholding search of arrestee's shoulder bag). As Dillard points out, this did not constitute a true inventory search, because only certain items were listed. Indeed, after discovering that the briefcase contained drugs, the police appear to have simply included it in the search of the property for which they had originally received the search warrant.

The question, however, is not whether police performed a legitimate inventory search after breaking open the briefcase. The question is instead whether police would have eventually performed an inventory search had they refrained from breaking open the briefcase at the scene of the arrest. There is no evidence in the record on this point. In all likelihood, if the briefcase had remained locked, it would have been transported to the police station with Dillard, whereupon it would have been subject to an inventory search as part of Dillard's booking process. The inevitability of such a search is a question of fact, and we defer to the finding of the district court, which held that such discovery would have been inevitable.

B. Lesser Included Offense

Dillard's second claim is that the district court erred by refusing to instruct the jury on the lesser included offense of simple possession. He concedes that the Court should review this claim only for plain error, because his trial counsel admitted that there was insufficient evidence to instruct the jury on the lesser included offense. A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater. *Keeble v. United States,* 412 U.S. 205, 208 (1973). Such an instruction should not be given unless "the proof on the element or elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser-included offense . . ." *United States v. King,* 567 F.2d 785, 790 (8th Cir. 1977). In this case, Sergeant Acklin testified that the street value of the crack seized was $3,000 to $10,000. He also testified that the amount was more consistent with distribution than with personal use. Although Dillard offered expert testimony in his first trial that ninety-nine grams of crack is consistent with personal use and could supply a heavy user for approximately three to four days, he failed to offer any similar evidence in his third and final trial.

Dillard maintains that Sergeant Acklin's testimony was sufficient to warrant the lesser included instruction. Sergeant Acklin, however, merely conceded the unremarkable point that a user of drugs could purchase a large quantity of drugs at one time. Considering the amount of drugs seized, the evidence that Dillard had plastic bags of the type often used to distribute crack, the evidence that Dillard actually distributed crack in two controlled buys shortly before he was arrested, and, most importantly, the lack of evidence that Dillard possessed crack for personal use, a rational jury could not have found that Dillard was a mere user, rather than a seller of drugs. Accordingly, it was not plain error for

the district court not to instruct the jury on the lesser included offense of simple possession.

C. Ineffective Assistance of Counsel

Dillard's third contention is that his trial counsel was ineffective for failing to present evidence to support the lesser included offense of simple possession and for failing to request the instruction. This claim was not raised below. As the government points out, we "generally will not review an ineffective assistance of counsel claim that is raised for the first time on appeal." *United States v. Straughter,* 950 F.2d 1223, 1234 (6th Cir. 1991); *United States v. Swidan,* 888 F.2d 1076, 1081 (6th Cir. 1989) ("This court will not review an ineffective assistance of counsel claim raised for the first time on appeal."). This rule is necessary because the record of the trial court's proceeding is normally insufficient for purposes of evaluating counsel's performance. *Id.* Therefore, such claims "are best brought by a defendant in a post conviction proceeding under 28 U.S.C. § 2255," where the parties "can develop an adequate record on the issue." *United States v. Daniel,* 956 F.2d 540, 543 (6th Cir. 1992). When the record is adequate to assess the merits of an ineffective assistance of counsel claim, however, the claim may be considered, even if it was never presented to the district court. *Straughter,* 950 F.2d at 1234; *United States v. Wunder,* 919 F.2d 34, 37 (6th Cir. 1990). The record before the Court in the instant appeal is sufficient to address the merits of Dillard's claim.

In order to demonstrate ineffective assistance of counsel, a defendant must affirmatively prove two elements. First, the defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). In other words, the lawyer must have committed unreasonable acts that "were outside the range of professionally competent assistance." *Id.* at 690. Second, the defendant must show

that the deficient performance prejudiced his defense. *Id.* at 687. This require showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Id.* To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Unless a defendant makes both showings, it cannot be said that the conviction or sentence resulted from a breakdown in the adversary process that renders the result unreliable.

We hold that Dillard's Sixth Amendment rights were not violated. Dillard argues that his trial counsel should have called an expert witness who would testify about whether the amount of crack in his briefcase was consistent with personal use. In Dillard's first trial, his earlier counsel had called Margaret DeArmond, a certified chemical dependency counselor who testified that a person in fairly good health who has been using crack for ten years or more could "easily" ingest an ounce of crack per day. Dillard contends that his later counsel should have called DeArmond again or called another witness who could testify about the habits of persons addicted to crack. "The jury instead heard only from the Government's witness, who can hardly be considered neutral and dispassionate on the issue of whether the crack attributed to Dillard was for personal use or for distribution." (Appellant's Br. at 44.)

As noted, there is nothing in the record to indicate why Dillard's trial counsel chose not to call DeArmond or a witness who could offer similar testimony. However, we hold that trial counsel's decision not to proceed with a "personal use" defense was the sort of trial strategy that may not be second-guessed by a reviewing court. As the Supreme Court explained, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has

proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland,* 466 U.S. at 689. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation omitted).

On the present record, Dillard cannot overcome the presumption that his trial counsel rendered adequate assistance. At the third trial, unlike the first trial, Dillard was charged with two counts of distributing cocaine base. Therefore, the "personal use" defense was more viable at the first trial, and it was not "outside the wide range of reasonable professional assistance" for the defense counsel to abandon it in favor of other defense theories at the third trial.

Dillard argues that his counsel did in fact pursue a "personal use" defense, but that the defense was pursued incompetently. Indeed, defense counsel appeared to cross-examine government witnesses in such a way as to attempt to establish the plausibility of a "personal use" defense, and the lesser-included instruction was proposed in the original jury instructions. Defense counsel requested and received a continuance to present a witness who could establish that Dillard was a drug user. This witness, Janice Parks, was not subpoenaed and failed to appear on the final day of the trial. Prior to giving jury instructions, the court discussed the missing witness at length with counsel for both parties, and Dillard's counsel gave some insight into the motivations behind his trial strategy:

> She was not subpoenaed, and I think it was originally a witness that Mr. Dillard did not want to use in this case, but as a result of, I guess, how the case was developed and was tried, you know, when I asked him well, you know, I don't think the other people that was used in the first trial and we would rely on in the second trial would have really

> been advantageous to his position in this case. I asked if there was anyone else and he gave me the name Janice Parks.

(02/28/01 Trial Tr., at 448-49.) It appears, then, that Dillard's counsel made a calculated decision not to call witnesses who, in the first trial, supported the theory of simple possession. This decision was apparently based on "how the case was developed and tried." *Id.* Thus, it is plausible that Dillard's counsel was unsatisfied with the results of his cross-examination of government witnesses, uncertain as to the usefulness of witnesses such as DeArmond in light of the superseding indictment, and unhopeful as to the ultimate success of the simple possession argument. Following a failed last-minute attempt to call a witness whom Dillard's counsel had never met, and whose testimony may or may not have been helpful to Dillard's case (02/27/01 Trial Tr., at 437-438), it was well within the range of professional representation for Dillard's counsel to acquiesce in the striking of the simple possession instruction and to abandon the "personal use" defense to focus on other issues.

D. Underlying Offense

Dillard's final argument is that the conviction under Count Four of the superseding indictment-carrying a weapon in relation to a drug trafficking indictment in violation of 18 U.S.C. § 924(c)—must be reversed if the underlying drug trafficking conviction under Count Three—possession with intent to distribute approximately 3.5 ounces of cocaine base in violation of 21 U.S.C. § 841—is reversed. He cites no authority for this proposition, and there is some authority to the contrary. *See United States v. Hill,* 971 F.2d 1461, 1464 (10th Cir. 1992) ("While proof of the underlying crime is necessary to convict under § 924(c), a defendant need not be convicted of the underlying crime in order to be convicted of § 924(c)."); *United States v. Wilkins,* 911 F.2d 337, 338 n.1 (9th Cir. 1990) ("A defendant need not be separately charged

or convicted of the underlying offense to be convicted under [§ 924(c)]."). In any event, Dillard has provided us with no basis to reverse the underlying conviction. Therefore, we need not address his final argument.

## V. CONCLUSION

For the reasons articulated above, Dillard's conviction on all counts is AFFIRMED.

CLAY, Circuit Judge, dissenting.

The majority opinion has rejected Dillard's Fourth Amendment challenge, reasoning that Dillard abandoned his briefcase, and that in any event the police officers' actions fell under exceptions to the Fourth Amendment warrant requirement. Because neither the record nor our precedent supports the majority's conclusion in this case, I respectfully dissent.

### *A. Dillard Did Not Abandon His Briefcase.*

The evidence presented at the suppression hearing before the district court reflects that on May 26, 1999, the Cleveland police arrived at the Clemont Avenue address to execute a search warrant they had procured. As the officers approached the side door, Dillard, who was carrying a black briefcase, and another person were leaving. Sergeant Thomas Acklin announced that he and the other officers were the police and had a search warrant for the premises. Dillard then either dropped or threw the briefcase onto the ground. As Sergeant Acklin and two other officers proceeded into the Clement Avenue residence to execute the search warrant, Detective Kennelly and three other officers grabbed Dillard and attempted to handcuff him. According to testimony, Dillard then allegedly pulled a loaded 9mm weapon from his waistband. Following a brief struggle, the officers managed to subdue Dillard and place him under arrest.

It is true that a defendant who abandons property cannot maintain a legitimate expectation of privacy with respect to the property, and subsequently lacks standing to challenge,

on Fourth Amendment grounds, admissibility of the evidence found pursuant to a search of that abandoned property. This determination is to be made on a case-by-case basis. *Abel v. United States,* 362 U.S. 217, 241 (1960); *United States v. Peters,* 194 F.3d 692, 696 (6th Cir. 1999) (citing *United States v. Brown,* 635 F.2d 1207, 1211 (6th Cir. 1980)).

Two Sixth Circuit cases are particularly instructive. In *United States v. Tolbert,* 692 F.2d 1041 (6th Cir. 1982), the actions of an airline passenger who had checked a cocaine-laden suitcase on a flight from Florida were held *not* to have manifested *an* expectation of privacy. The defendant in *Tolbert* checked her luggage, but upon arrival, passed through the baggage claim area without picking up her luggage; when questioned by the authorities, she denied having any luggage. *Id.* at 1043-44. We concluded that the defendant's affirmative disclaimer of the luggage meant that she had abandoned the suitcase and she therefore lacked standing to challenge the search of that luggage. *Id.* at 1044-46.

However, in *United States v. Sanders,* 719 F.2d 882 (6th Cir. 1983), a suitcase containing cocaine and marijuana had been checked through on the ticket of an airline passenger flying north from Florida. Believing that she was under surveillance, the passenger left the airport at her destination without retrieving her suitcase from the baggage claim area. When questioned by law enforcement officials, she said that she had not claimed the suitcase because she was not going straight home. She refused to consent to a search of the suitcase, thus actively indicating an interest in keeping the contents private. *Id.* at 883-84. Under these circumstances, we held that there had been no abandonment. *Id.* at 885-86.

A suitcase or briefcase is property of a kind in which the owner ordinarily has a strong expectation of privacy. Although this expectation can be given up, *Sanders* requires an *affirmative disclaimer* (through actions or words) before a court may determine that the property at issue was

abandoned. *Id.* at 886; *see also United States v. Peters,* 194 F.3d 692, 696 (6th Cir. 1999) (citing *Sanders* with approval for the proposition that "affirmative disclaimer required for privacy right to be lost").

In the present case, the officers shouted at Dillard to halt, which he did, dropping or flipping his briefcase no more than four feet away in the process. Mere physical separation from the briefcase under these circumstances does not defeat Dillard's standing; he would have to evince an intent to disclaim or otherwise abandon the property. *Smith v. Ohio,* 494 U.S. 541, 543-44 (1990). And in fact, the record does not indicate any such affirmative disclaimer. At no time did Dillard state that the briefcase did not belong to him, nor did he drop the briefcase during flight. He apparently dropped it in what appears to have been a reflexive reaction or an attempt at compliance with the officers' order to raise his hands.

The majority relies on an assortment of cases, none of which support a finding of abandonment. In each of these cases the defendant affirmatively disclaimed ownership of the property by tossing or dropping the property while in flight from the police and therefore effectively abandoned it. *See United States v. Torres,* 949 F.2d 606, 607, 608 (2d Cir. 1991) (defendant disclaimed ownership interest in the bag that was searched); *United States v. Morgan,* 936 F.2d 1561, 1570-71 (10th Cir. 1991) (defendant threw the shoulder bag while attempting to elude the authorities); *United States v. Frazier,* 936 F.2d 262, 265 (6th Cir. 1991) (defendant denied ownership of the bag or knowledge of its contents); *United States v. Knox,* 839 F.2d 285, 287, 293-94 (6th Cir. 1988) (defendants "specifically disclaimed ownership of the bag"); *United States v. Collis,* 766 F.2d 219, 222 (6th Cir. 1985) (defendant dropped or threw the property away while fleeing from the police); *State v. Oliver,* 368 So. 2d 1331, 1334 (Fla. Ct. App. 1979) (police attempted to question defendant who was riding his bicycle; defendant continued to ride his bicycle and threw a paper bag to the ground). The majority

also attempts to rely on dicta in *United States v. Sims,* 808 F. Supp. 596, 604 n.14 (N.D.Ill. 1992), for the proposition that merely dropping an item to the ground constitutes abandonment for Fourth Amendment purposes. In *Sims,* police officers approached the defendant and another woman who were leaving a bank with a heavy satchel and other items. However, the defendant not only dropped the envelope to the ground, she disclaimed ownership of various other items in her possession, and it therefore was more logical to infer an intent to abandon on her part. *Sims,* 808 F. Supp. at 600. Dillard, in contrast, was not fleeing from the police, he was not attempting to hide the briefcase, and he did not disclaim ownership of the briefcase or the contents therein. In short, his actions did not evince an intent to abandon.

The majority also cites *United States v. Park,* No. 96-6342, 1998 WL 69028 (6th Cir. Feb. 9, 1998) (unpublished), where the defendant, having spotted police officers approaching his trailer, dropped a thermos out of the window, and thus the thermos was deemed to have been "thrown away," *i.e.*, discarded or abandoned. *Park,* 1998 WL 69028, at *1. The intent to abandon is stronger in that instance because the defendants probably hoped the police would not recover the property or not be able to connect it with them. However, in this case, the officers observed Dillard holding the briefcase when they approached him, and he dropped it no more than four feet from where he was standing. There was no way Dillard could have seriously hoped to disassociate himself from that property. *Because* Dillard did not exhibit any intention to abandon *the briefcase,* he "'exhibited an actual (subjective) expectation of privacy,' "which society would treat as reasonable." *Minnesota v. Carter,* 525 U.S. 83, 109 (1998) (quoting *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Certainly, the present case is at least as strong, if not stronger, for a finding of standing as it was in *Sanders,* where we did find standing. *Consequently,* Dillard did not

abandon his briefcase, and he had standing to make his Fourth Amendment challenge.[2]

The fatal flaw in the majority's reasoning is that there is no legal support for the notion that a suspect who drops an item on the ground while remaining stationary, and who continues to remain stationary after dropping the item on the ground, has abandoned the item. All of the case on which the majority attempts to rely involve defendants who dropped items while on the move or otherwise attempting to elude the police. Dillard, on the other hand, was not on the move at any point during the encounter, and he was in the police officers' plain view. Simply dropping or flipping a briefcase does not evince an intent to abandon.[3]

Arguing otherwise, the majority invokes our decisions in *United States v. Collis*, 766 F.2d 219 (6th Cir. 1985) and *Shamaeizadeh v. Cunigan*, 338 F.3d 535 (6th Cir. 2003) and the Tenth Circuit's decision in *United States v. Morgan*, 936 F.2d 1561 (10th Cir. 1991) to support its view that Defendant abandoned the briefcase. Those cases are thoroughly distinguishable. Though the majority acknowledges that the *Collis* defendant "dropped" the bag and attempted to flee, it still believes *Collis* was "sufficiently similar" to this case to "warrant the same result." The defendant in *Collis* did not simply "drop" the bag, he threw the bag over a fence. *Collis*, 766 F.2d at 221. The *Collis* defendant clearly had no reasonable expectation of privacy in a bag that he "heaved" over a fence in an effort to forfeit

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[2] *United States v. Jabara*, 618 F.2d 1319, 1324-25 (9th Cir. 1980) and *United States v. Arboleda*, 633 F.2d 985, 991-92 (2d Cir. 1980), on which the majority also relies, are inapplicable for the same reason that *Park* is inapplicable.

[3] The majority also suggests that Dillard was discarding the briefcase while resisting arrest. A more likely explanation is that he put the briefcase down, or dropped it, not to abandon the briefcase, but so that he would have both hands free during his initial encounter with the police. Even if Dillard attempted to resist arrest, that act, though illegal, does not necessarily mean that he intended to abandon the briefcase.

possession. *Id.* Likewise, ***Shamaeizadeh*** is distinguishable because it is a civil case and the plaintiff there did not have standing to assert an expectation of privacy in the basement of property he owned but did not occupy. *See Shamaeizadeh,* 338 F.3d at 544. Nor is *Morgan* persuasive because defendant there "threw" the bag south of a porch in the backyard of a residence that "abutted an open field in a wooded area" and the "bag would have been plainly visible to those passing by the yard via those open areas." *Morgan,* 936 F.2d at 1571. The bag would therefore be available to passersby, rendering unlikely the possibility that the defendant would be able to retrieve the bag in the future. *Id.* *Morgan* reasoned that "abandonment must be voluntary" and that "police pursuit or investigation at the time of abandonment does not of itself render the abandonment involuntary." *Id.* at 1570 (quoting *United States v. Jones,* 707 F.2d 1169, 1172 (10th Cir. 1983)). Based on the facts here, it cannot be persuasively posited that Defendant voluntarily desired to "forfeit any expectation of privacy" he had in the briefcase. *Id.* (internal quotations omitted).

### *B. The Briefcase Search Was Not Incident to a Lawful Arrest.*

Additionally, the Fourth Amendment exceptions on which the government attempts to rely are unavailing. For instance, the government suggests that the briefcase search was incident to a lawful arrest. While it appears to be uncontested that Dillard's arrest was lawful, the facts indicate that the search was anything but incident to the arrest.

In *Chimel,* 395 U.S. at 763 (1969), the Supreme Court established the "search incident to a lawful arrest" exception by holding that arresting officers may conduct a warrantless "search of the arrestee's person and the area 'within his immediate control'—constructing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." The rationale for allowing such a search is the protection of law enforcement officers

and the preservation of evidence. *Id.* In a subsequent decision, the Supreme Court made clear that officers may search the suspect's person and the area within his immediate control so long as the search is substantially contemporaneous with the arrest. *Shipley v. California,* 395 U.S. 818, 819 (1969).

However, there are restrictions on this exception. For instance, in *United States v. Chadwick,* 433 U.S. 1 (1977), police conducted a warrantless search of a footlocker seized from the defendant's car. *Id.* at 3-4. The Supreme Court held that a warrantless search incident to a lawful arrest is limited to the defendant's person and areas within his immediate control, and does not extend to personal containers seized from the defendant at the time of the arrest and subsequently reduced to the exclusive control of the police. *Id.* at 15.

In the present case, Dillard had been handcuffed and safely escorted into a police vehicle. The briefcase was recovered from the ground by a police officer, who took it inside to assemble it with the other evidence discovered in the Clemont Avenue residence. The facts of this case are closely analogous to those in *United States v. Calandrella,* 605 F.2d 236 (6th Cir. 1979), where we held that once officers have gained exclusive control over a suspect's property, a subsequent search of the property is unreasonable in the absence of a search warrant. We reasoned that "once the agents had seized the item and reduced it to their exclusive control there was no further danger that the defendant would secure therefrom either a weapon or an instrumentality of escape, or would destroy evidence contained in the briefcase. . . . Thus the interests sought to be protected by permitting warrantless searches incident to an arrest were fully vindicated by the seizure of the briefcase at the time of the arrest." *Id.* at 249 (citations omitted).

Instead of following applicable published case authority, the majority relies on an unpublished case that endeavored to distinguish *Chadwick* and *Calandrella* by reasoning that

while the searches in those two cases had occurred after the suspect and the property had been transported to the police station, the search at issue had been "conducted while everyone was still at the scene of the arrest." *United States v. Blevins,* 234 F.3d 1270 (Table), 2000 WL 1597821, at *4 (6th Cir. Oct. 20, 2000) (citations omitted). Yet *the majority opinion exhibits* a fundamental misunderstanding of the appropriate Fourth Amendment inquiry. The appropriate inquiry under these circumstances does not rest on where the search took place, but on whether any exigencies required a protective sweep reaching the contents of the briefcase. It is abundantly clear that once Dillard had been arrested, handcuffed, and placed in the police vehicle, all the officers (of which there were many at the scene) had to do was place the briefcase in a squad car or place it with the other evidence to be collected. There is no conceivable exigency that would reach a protective sweep of a locked briefcase.

The search incident to an arrest rule was created to protect officers from any harm a suspect might inflict with nearby objects, and to prevent destruction of evidence. The majority's reasoning here essentially turns the *Chimel* rule on its head, because it allows an officer relatively free rein to search areas where the suspect was standing when arrested, even *after* the danger has *subsided.* To suggest that the mere fact of an arrest gives a police officer license to search anything long after the exigency has abated would raise form over substance and swallow whole the *Chadwick/ Calandrella* rule. *See United States v. Myers,* 308 F.3d 251, 270 (3d Cir. 2002) (rejecting a suggestion that a search conducted after a suspect has been arrested, handcuffed, and placed in a squad car "stray[s]" beyond the parameters that the Supreme Court tried to erect in *Belton."*).

### *C. The Briefcase Search Did Not Constitute a Lawful Inventory Search, and The Inevitable Discovery Doctrine Does Not Apply.*

The briefcase search did not fall within the lawful inventory search exception to the Fourth Amendment

warrant requirement. The inventory search exception requires that (1) the search is conducted pursuant to established police procedures; and (2) the search is not a pretext for gathering evidence. *Colorado v. Bertine,* 479 U.S. 367, 371-74 (1987). The rationale for allowing warrantless inventory searches is to safeguard a defendant's property and to protect the police against any claims of lost property. *Id.* at 372-73.

The government has not pointed to anything in the record establishing that the search was conducted pursuant to any established police procedures. Indeed, this seems unlikely, as the list of property taken from the briefcase later produced during the suppression hearing was incomplete, and omitted mention of other items located in the briefcase, such as toiletries. When questioned as to the incompleteness of the list, Detective Santiago explained that this was because, unlike the drugs and drug paraphernalia, such items as toiletries "held no evidentiary value." (Supplemental Joint Appendix at 457.) This very admission also negates the possibility that this search was anything other than a pretext for gathering evidence. The Supreme Court fairly recently has underscored the notion that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Florida v. Wells,* 495 U.S. 1, 5 (1990).

The government lamely argues that there is no evidence on the record that the search was not pursuant to a lawful inventory. Yet the government must be reminded that it, not Dillard, bears "the burden of showing that the inventory search was conducted pursuant to standardized criteria." *United States v. Richards,* No. 01-1999, 2003 WL 151417, at *2 (6th Cir. Jan. 17, 2003) (unpublished) (citing *United States v. Gregory,* Nos. 91-6400, 91-6431, 1992 WL 393144, at *7 (6th Cir. Dec. 22, 1992)); *see also Sanders,* 442 U.S. at 759-60. Therefore, the government's argument that the inventory exception applies is wholly unpersuasive.

Finally, the majority's conclusion that the inevitable discovery doctrine applies is misplaced. The government has presented no evidence tending to show that the briefcase's contents would inevitably have been catalogued pursuant to an established inventory procedure. The district court, as does the majority, seems to *assume* that there is an established procedure which would have been followed in this case, but I find no reason to make such an assumption.

## CONCLUSION

The facts of this case, as well as our established precedents, merit suppression of the briefcase evidence. Because I would reverse the district court's judgment and remand with instructions to grant Dillard's motion to suppress, I respectfully dissent from the majority's decision.

No. 01-3743

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| BRUCE A. DILLARD, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |

BEFORE: CLAY and GIBBONS, Circuit Judge; and CLELAND,[1] District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active[2] judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

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[1] Hon. Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

[2] Judge Sutton recused himself from participation in this ruling.

ENTERED BY ORDER OF THE COURT

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Leonard Green, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | Criminal Action No. 1:99cr249 |
| vs. | ) | |
| BRUCE DILLARD, | ) | |
| Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE DAN AARON POLSTER, JUDGE OF SAID COURT, ON THURSDAY, NOVEMBER 18, 1999 AT 1:40 O'CLOCK P.M.

APPEARANCES:

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Court Reporter:
Richard G. DelMonico
404 U.S. District Court
Two South Main Street
Akron, Ohio 44308
(330) 535-2280

THE COURT: Good afternoon. Please be seated.

Okay. We are here today on case 1:99-CR-249, the United States versus Bruce Dillard. Mr. Dillard is here with his attorney, Mr. Terez; and Ms. Brunst is here for the government.

We are here this afternoon on a hearing on the defendant's motion to suppress evidence, specifically the contents of a briefcase.

Is that correct, Mr. Terez?

MR. TEREZ: That's correct, your Honor.

THE COURT: I have read the defendant's motion and memorandum, and the government's response. And, as I understand it, the issue that needs to be addressed first is whether or not the defendant has standing to object to a search of the briefcase; or whether he potentially lost his standing by abandoning the briefcase.

The second one would be whether the government had a basis, under the law, to search the briefcase, in any event.

And the third one would be whether or not the government used excessive force. And if I find there was excessive force, how would that bear on the validity of the search of the briefcase.

So I think those are the issues.

* * *

THE COURT: Thank both of you.

I've heard the evidence, I am prepared to announce my ruling.

The motion to suppress is denied. Its denied on the following grounds.

First, the undisputed testimony admitted by the defendant is that there was a valid arrest warrant. And wherever that briefcase was, even if Mr. Dillard had been just carrying that

briefcase, the officers were entitled to search it, at least an inventory search, incident to a that lawful arrest.

And, quite frankly, even if I find there was excessive force, I think that might only go, as I read the cases, understanding it to figure that was the fruit of the force. There would have been a search, at least an inventory search, of that briefcase if it was being carried by Mr. Dillard regardless of any altercation or the reason for that altercation. Inevitably, the officers would have searched Mr. Dillard's briefcase and found the contents, whether it was one gun or two guns, and the drugs.

So, basically, the reason the motion is denied is because there was a lawful search incident to arrest of that briefcase. And inevitably, what was in there would have been found.

Now, I also find that the defendant has not carried his burden of showing there was excessive force. There has really been only one witness who testified as to the cause and circumstances for the struggle that occurred between Mr. Dillard and law enforcement officers, and I find his testimony credible.

I can't see any reason why he would come into court, take an oath and just flat out lie and invent the fact that he was in a fight for his life, and he was lucky that gun didn't discharge into either Mr. Dillard, himself or others.

So, I find that, in fact, if any force was used, it was to wrestle the gun away from Mr. Dillard. And the officer, Officer Kennelly was not cross examined at all on his testimony that, you know, that at the end of the whole evening or early the next morning when he asked Mr. Dillard why did he pull the gun, Mr. Dillard said, using an obscenity, I know you how you police are. I would have killed as many of you as I could.

I think that is a clear admission by the defendant, not only that he pulled the gun, but that he planned to use it to kill people.

So I'm satisfied there was no excessive force. So the standing issue, I think, is really sort of almost irrelevant, because I've concluded on the merits that Mr. Dillard can't prevail.

I think there is—certainly there is more evidence than not that he discarded that briefcase. But quite frankly, I'm not even going to decide the standing issue. I know that courts are supposed to decide that first, but I don't even—I think if I have to decide it, I think the government has the stronger argument that he discarded it.

And although the evidence is it was his briefcase, because I think that was the one thing Mr. Holley was clear about, that Mr. Dillard had a briefcase and there was at least one gun in it while he was up in the house and then went down the stairs, the evidence is that Mr. Dillard flung it away when he saw the officer.

And while I agree with Mr. Terez, you are not likely going to fool anyone by throwing a briefcase away in the presence of five or six officers, people often do something quickly out of instinct without doing a lot of thinking.

And there is no question what was in that briefcase was highly incriminating. There was drugs, and at least one gun, maybe two, but at least one gun. And so there was a good reason for Mr. Dillard not to be wanting to be carrying that briefcase out of the house when he knew there were five or six law enforcement officers. So that is my ruling on this.

So the motion is denied. This case is set to go to trial on—

MS. BRUNST: December 22nd, you Honor.

THE COURT: Right, December 22nd. And we have a couple of other dates; a pretrial and a change of plea deadline, all right? Set by order of the court, okay?

Anything further from either the government or the defendant?

MS. BRUNST: No. Thank you, your Honor.

MR. TEREZ: Nothing further, your Honor. Thank you.

THE COURT: Okay, we are in recess.

(Hearing concluded.)

**IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | Judge Daniel A. Polster<br>Cleveland, Ohio |
| vs. | ) | |
| BRUCE DILLARD, | ) | Criminal Action<br>Number 99CR249 |
| Defendant. | ) | |

TRANSCRIPT OF PRETRIAL PROCEEDINGS
HAD BEFORE THE HONORABLE
DANIEL A. POLSTER,
JUDGE OF SAID COURT,
ON WEDNESDAY, SEPTEMBER 13, 2000.

APPEARANCES:

| | |
|---|---|
| For the Government: | Christa D. Brunst,<br>Assistant U.S. Attorney<br>1800 Bank One Center<br>600 Superior Avenue, East<br>Cleveland, Ohio 44114-2600 |
| For the Defendant: | Albert Giuliani, Esq. |
| Official Court Reporter: | Susan K. Trischan, RMR, CRR<br>U.S. District Court-Room 568<br>2 South Main Street<br>Akron, Ohio 44308<br>330/374-9335 |

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

The COURT: All right. We are here this afternoon on Case 1:99CR249, United States of America versus Bruce Dillard.

Mr. Dillard is here in court with his attorney Mr. Giuliani, and we have Ms. Brunst for the U.S. Attorney's Office.

This case is set for trial on September 25th here in Cleveland, Monday, September 25th. Some matters came up that I wanted to take up at this time.

We have a final pretrial that is set for this coming Friday, the 15th, at 1:30, but I didn't want to wait until then.

I guess the first item I want to take up is the motion to suppress that Mr. Giuliani filed earlier this week, specifically to suppress the contents of a briefcase belonging to Mr. Dillard. And my recollection from the first trial is that the—among the contents was drugs which formed the basis of one of the counts in the indictment.

Correct, Ms. Brunst?

MS. BRUNST: Yes, Your Honor.

THE COURT: All right. I have reviewed this matter carefully. There was a suppression motion filed by prior counsel, Mr. Terez; specifically to suppress the contents of the briefcase. And we had a fairly lengthy hearing on November the 18th, 1999, that went for several hours is my recollection, and at the conclusion of that hearing, I announced my findings which were to deny the motion to suppress for several grounds.

The focus of that hearing was on Mr. Dillard's contention that unreasonable or excessive force had been used to effectuate the arrest, and that that somehow tainted the search of his briefcase. So I denied that motion for several reasons, and I articulated those reasons in the record.

Mr. Giuliani has filed another motion to suppress the contents of the briefcase and has requested an evidentiary hearing. I have determined that we don't need another hearing. We had one. All the witnesses testified. The

government had a number of witnesses. I think the Court even called one. Defendant—it was defendant' s motion so defendant called witnesses. Mr. Dillard did not testify, but that was his option.

And I see no reason to have another hearing. We have had all the witnesses. And I believe that the evidence that I saw and heard on that date. And, quite frankly, some of the same issues were raised, so I'm going to deny the defendant's motion to suppress.

I'm going to specifically find—denying it for several grounds. First, I do not believe the defendant has standing to object because the evidence showed that the defendant had abandoned that briefcase by throwing it away prior to his being apprehended.

That's the evidence I found, and I made those findings last November, and I believe they were correct.

Even if the defendant did not throw away or abandon his briefcase and would have standing to object, I further conclude that a search of the briefcase was proper as a proper search incident to a lawful arrest. The arrest has not been challenged as being unlawful, and it would be appropriate and prudent to search the person of the defendant and the area within his intermediate control and various things in his control.

So even if, quite frankly, Mr. Dillard had been holding that briefcase tightly in his hand when he was arrested, it would have been appropriate and prudent and lawful for the officers to search it.

And as a further basis, I find that the contents of that briefcase would have been inevitably discovered, because even if for some reason the briefcase hadn't been searched at the time of the arrest and it had been in Mr. Dillard's possession, that briefcase would have been searched as an inventory search at some point after the arrest.

So for all those reasons, I am denying Mr. Dillard's motion to suppress the contents of the briefcase.

* * *

**IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | Judge Polster |
| vs. | ) | Cleveland, Ohio |
| BRUCE DILLARD, | ) | Criminal Action Number 1:99CR249 |
| Defendant. | ) | |

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE DAN A. POLSTER
JUDGE OF SAID COURT
ON TUESDAY, FEBRUARY 27, 2001
VOLUME 2

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

DIRECT EXAMINATION OF MICHAEL DEMCHAK
BY MS BRUNST

* * *

Q. Now, did there come a time, Detective Demchak, on May 26th, when you learned that the premises were, in fact, secured and you would thereby be permitted to move?

A. Yes.

Q. And what did you, in fact, do then?

A. I came around the side of the house. And as I came up the driveway—

Q. Why don't you show us on the graph there what you did, you plot, your course, if you would.

A. I walked around the side of the house. As I came up along the side of the house, Detective Kennelly had the Defendant Mr. Dillard, handcuffed, and he was advised of his rights. And Detective Kennelly informed me that there was a briefcase lying on the ground that the Defendant had abandoned off to the side. And so I went up and I checked out the briefcase.

Q. All right.

As a result of learning the information from Kennelly about the briefcase, what did you do?

A. I examined the contents of the briefcase.

Q. All right.

And how did you gain access to the briefcase on that evening, sir?

A. Well, the briefcase was locked. So I popped the latches open.

Q. All right. What—what happened next?

A. Well, I observed there was contraband inside there and definitely needed to be photographed. And while I was examining this, one of the officers—Officer Petkac came down from upstairs, stating they needed assistance up there because there was a lot of people up there.

Q. And what did you do?

A. Well, I—everything down at that time, everything outside was pretty much secure and calm. So I informed Detective Kennelly about the briefcase still be down there, and I went upstairs to assist the other officers.

* * *

CROSS-EXAMINATION OF MICHAEL DEMCHAK

BY MR BUTLER:

* * *

Q. Officer Demchak, other than being an outside man there that evening, did you have any other specific duties that evening on May 26, 1999?

A. In regards to the search warrant?

Q. Right.

A. Well, I was outside cover and then once upstairs, I assisted in the search.

Q. Prior to going upstairs, you indicated that you were directed to that briefcase there?

A. That's correct.

Q. And if I'm not mistaken, you said you pried the locks off?

A. Yes.

Q. Was it locked?

A. Yes, it was.

Q And what did you use to pry the locks off?

A. I had a small pair of pliers.

Q. You had those on you?

A. Yes.

Q. You carry pliers on you?

A. Yes, it's a utility knife, and you unfold it. There's a pair of pliers on it.

Q. Was there a necessity for you to go into that briefcase at that exact moment?

A. Well, what I really wanted to determine was whether or not it needed to be photographed.

Q. And if I'm not mistaken, you indicated when you opened it, you determined there was content that needed to be photographed?

A. That's correct.

* * *